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Supreme Court, U.S.
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No. 98-1661

In The
Supreme Court Of The United States

October Term, 1998

FLEET BANK, NATIONAL ASSOCIATION,
Petitioner.

v.

THE HONORABLE JOHN P. BURKE,
BANKING COMMISSIONER OF THE STATE OF
CONNECTICUT AND CONNECTICUT DEPARTMENT OF
BANKING, A STATE AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PARTIES

The caption of the case contains the name of all parties to the case. Petitioner, Fleet Bank, National Association is associated with only one publicly-traded corporate entity, its corporate parent, Fleet Financial Group, Inc. Petitioner has no nonwholly owned subsidiaries.

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A. The Commissioner's Opposition Casts No Doubt Upon The Reasons Fleet Presented In Support of a Grant of Certiorari

The Commissioner's Opposition ("Opp.") is more noteworthy for what it does not say than for what it does.

1. Fleet's Petition established that the Second Circuit's holding--that the federal courts lose federal question jurisdiction over a claim of statutory preemption when the complaint also includes a related challenge under state law--conflicts with decisions in nine other circuits. The Commissioner does not cite any of these cases, much less dispute that a square conflict exists.[1] That conflict calls for resolution by this Court.

2. Fleet's Petition explained that that circuit conflict concerns an issue of broad and recurrent importance, one that has arisen in litigated cases in such varied areas as telecommunications, environmental protection, housing regulation, aviation, tobacco advertising, energy regulation and securities law. (*See* Pet. at 12-17 & n.15.) The Commissioner's silence in response implicitly concedes the breadth and importance of the circuit conflict.

3. Fleet's Petition demonstrated that the decision below conflicts with congressional determinations embodied in 28 U.S.C.§ §1331 and 1367, and with decisions of this Court, particularly *City of Chicago v. International College of Surgeons*, ___ U.S. ___, 118 S.Ct. 523 (1997). The Commissioner essentially makes no effort to show that the decision below can be reconciled with those

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[1]His only gesture in this regard is to state that "a number" of the conflicting decisions had "a jurisdictional basis under § 1983." (Opp. at 15 n.10). That statement falls short in three ways. First, even on its own terms it fails to distinguish conflicting decisions that do not rest on § 1983. Second, § 1983 is not a jurisdictional grant but a federal cause of action, one that a federal court may hear only under a grant of subject matter jurisdiction like § 1331 or § 1343(3), and the Second Circuit's reasons for thinking that jurisdiction was "ill-advised" would apply whether the federal claim was viewed as arising under § 1983 or directly under the National Bank Act. Third, as our Petition notes, although Fleet's Complaint did not refer to § 1983, it adequately stated facts supporting a § 1983 claim. (*See* Pet. at 25 n.19.)

authorities.[2]

Thus, the Commissioner does not contest the core propositions underlying Fleet's Petition: that the decision below creates a circuit conflict on a basic and recurrent issue of federal jurisdiction, and that it cannot be reconciled with governing statutory and judicial authorities.

B. The Commissioner's Reasons for Denying the Writ Miss the Point

What, then, are the Commissioner's arguments against granting review?

1. First, he suggests that Fleet "has failed to identify any legal issue that cries out for this Court to determine," because the pending proceedings before a state agency, a state court and the federal district court provide ample opportunities to determine the legality of the Commissioner's efforts to ban ATM fees. (Opp. at 4.) That suggestion misunderstands the basis for Fleet's Petition, which seeks review not of substantive questions of banking law, but of this jurisdictional question: "Does a federal court lose its jurisdiction under 28 U.S.C. § 1331 to hear a claim that federal law preempts official action if the plaintiff also alleges that the official action is not authorized under state law." That question cannot be resolved by a Connecticut state tribunal. And absent correction by this Court, the erroneous decision below would remain the law in the Second Circuit, to be applied in a myriad of other areas even were the substantive legality of a ban on ATM fees to be resolved.

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[2]The Commissioner merely asserts that "[t]he petitioner's claim that the judgment below conflicts with 28 U.S.C. § 1367 or with any of this Court's decisions under it is entirely manufactured"(Opp. at 6)--an assertion supported only by a contention that *College of Surgeons* is distinguishable because "there, unlike this case, there *was* an independent basis for federal question jurisdiction, which permitted the federal court to adjudicate a properly submitted supplemental claim." (Opp. at 6 n.3.) That is no distinction at all: Fleet's Complaint asserted a federal preemption claim which, under *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), provided an independent basis for federal question jurisdiction. (*See* pp. 8-9, *infra*.)

Fleet asserts a right, conferred by Congress in §§ 1331 and 1367, to have its substantive claims determined in a federal court. To respond that those claims can be decided in another forum thus misses the point. Indeed, were this Court to accept the Commissioner's argument, it would never review an erroneous denial of federal jurisdiction, for the plaintiff virtually always could get the substantive issues resolved thereafter in a state court proceeding. To state the obvious: a circuit conflict about an important jurisdictional question, no less than one concerning a substantive issue, is an appropriate occasion for the grant of certiorari.

2. The Commissioner next asserts that Fleet was really seeking federal court determination of a state law issue, and tried "to manufacture jurisdiction" by raising a preemption claim. (Opp. at 2.) Fleet's Complaint and the law it invokes thoroughly refute this characterization. The Complaint avers that "the Connecticut ATM statutes are preempted by 12 U.S.C. § 24 (Seventh) to the extent that these statutes are interpreted to prohibit Fleet from" charging ATM fees, and it prays for a declaration that "the National Bank Act conflicts with and preempts the Connecticut ATM statutes" and an injunction against the statutes' enforcement. (App. A81, A82.) This allegation and request for relief state a federal question. That question confers §1331 jurisdiction on the District Court unless the federal claim "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682-83 (1946).

The Opposition does not and could not contend that Fleet's federal claim is "immaterial" or "wholly insubstantial." The National Bank Act grants Fleet "all such incidental powers as shall be necessary to carry on the business of banking," 12 U.S.C. 24 (Seventh), and both federal regulations[3] and Fleet's federal regulator[4]

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[3]*See* 12 C.F.R. § 7.1019 (1999)(authorizing national banks to use electronic means, such as automated teller machines, to conduct business); 12 C.F.R. § 7.4002 (1999)(permitting national banks to impose charges, other than interest, for services banks provide.).

[4]*See* Brief Amicus Curiae of the Office of the Comptroller of the Currency at 3, *Fleet Bank, N.A. v. Burke*, 160 F.3d 883 (2d Cir. 1998)(stating that the imposition of an ATM fee by a national bank

make clear that those powers include the right to charge fees for the use of Fleet's ATM's. As this Court stated in *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996) (citation omitted), "grants of both enumerated and incidental 'powers' to national banks [have been construed] as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law." Fleet's preemption claim is anything but frivolous.

As the sole support for his claim that Fleet sought to "manufacture" jurisdiction, the Commissioner observes in outraged italics that Fleet "sought a plaintiff's summary judgment *exclusively* on the state law issue." (Opp. at 3 (emphasis in original)). But the Commissioner himself agreed to that procedure, filing his own motion for summary judgment on the state law question, and the District Court's scheduling order required it. (App. A87, A90.) More importantly, the District Court's jurisdiction depends on the claims made in the Complaint, not on the order in which the Court adjudicates those claims.

3. The Commissioner does not contest Fleet's argument that the decision below conflicts with 28 U.S.C. § 1367. Rather, he seeks to deflect that argument by suggesting that it was first raised in the Petition for Certiorari and should therefore be disregarded. (Opp. at 5-6.)

To the extent that the Commissioner states that Fleet did not rely on supplemental jurisdiction in its briefs to the Second Circuit, his thrust is partially correct but irrelevant. Fleet did not raise supplemental jurisdiction in its main appellate brief because the Commissioner's claims on appeal were that a preemption claim does not support "arising" under jurisdiction, that the District Court should have abstained on the state law issue, and that the District Court's decision on the state law question was wrong. The panel decision was the first time anyone suggested that the presence of a state law question dissolves § 1331 jurisdiction over a federal claim. Fleet's petition for rehearing pointed to the inconsistency between that holding and *College of Surgeons*, a case that discusses supplemental jurisdiction at length. Fleet's argument here is better elaborated than in its petition for rehearing, but that fact does not bar Fleet from

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"is authorized under federal law.")

presenting it to this Court.[5]

To the extent that the Commissioner claims that Fleet cannot rely on the inconsistency between the doctrines of supplemental jurisdiction and the holding below because Fleet did not explicitly plead supplemental jurisdiction in its Complaint, his contention is both wrong and irrelevant. Contrary to the Commissioner's argument (Opp. at 5), it is not the law that the statutory basis of jurisdiction must be specifically alleged in a complaint. Rather, what must appear in a complaint are facts sufficient to establish jurisdiction.[6] As Judge Friendly observed, this is especially true in connection with pendent jurisdiction, "since the court already has jurisdiction over the case." *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800, 809 (2d Cir. 1971). *Accord, e.g.*, 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1207 at 97 (2d ed. 1990). Fleet's Complaint seeking relief under both the federal preemption doctrine and state law adequately pleaded supplemental jurisdiction over the state law issue.

Moreover, The Second Circuit did not hold, and the Commissioner does not contend, that the District Court incorrectly exercised jurisdiction over the state law question; it held that because of the state law question, the District Court had no jurisdiction over the federal question Fleet presented. The issue here is not whether the District Court had jurisdiction to decide the state law question, or whether it should have abstained from doing so,[7] but whether its jurisdiction over the federal preemption claim dissolved because of the state law issue. In evaluating the correctness of the Second Circuit's novel holding, this Court can and should look to the inconsistency between that holding and the principles of pendent jurisdiction it has enunciated and Congress has enacted in § 1367.

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[5]A petition for rehearing is, after all, not a mandatory precursor to a petition for certiorari.

[6]*E.g.*, *Love v. United States*, 915 F.2d 1242, 1249 (9th Cir. 1980) ("no jurisdiction-conferring provision need be specifically pleaded, as long as the Complaint sets forth facts giving the court jurisdiction;") 5 Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 1206 at 90 (2d ed. 1990).

[7]The Second Circuit did not reach that question.

C. The Commissioner's Efforts to Defend the Judgment Below Fall Short

Although the Commissioner makes no effort to defend the Second Circuit's conclusion that acknowledged jurisdiction over a federal preemption claim dissolves when that claim is joined with a state law claim under the challenged statute, his final argument is that the decision below was correct. Even if the Commissioner's alternative grounds for supporting the holding below were colorable, this Court should grant certiorari to resolve the conflict between the Second Circuit and the nine other circuits which have upheld jurisdiction in similar cases. The fact that the Commissioner and the Second Circuit are wrong provides added reason for this Court to review the decision below.

1. The Commissioner's first argument in defense of the Second Circuit's holding is that the District Court should not have ruled on the question of state law. (Opp. at 7-8.) This argument is disingenuous, since the Commissioner agreed in the District Court to have the state law issue decided before the federal preemption claim. Moreover, it cannot justify the decision below for two independent reasons.

First, established doctrines, of narrow scope, govern when a federal court may refuse to decide a state law claim properly within the court's jurisdiction. Section 1367(c) specifies when supplemental jurisdiction may be declined; neither the Commissioner nor the court below cited that section or suggested that its criteria were satisfied. Similarly, the Commissioner does not contend that the District Court erred in denying his motion to abstain under *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), on the grounds that the state ATM statutes are not unclear and that Fleet did not present a federal constitutional question that might be avoided by abstention. (App. A57.)

Second, and more fundamentally, a concern about federal adjudication of state law issues could at most justify refusal to decide the state law claim, leaving intact Fleet's federal preemption claim and federal question jurisdiction under § 1331. That concern cannot, however justify the decision that the Second Circuit made--to dismiss Fleet's action in its entirety, including its federal claim under the

National Bank Act.[8]

2. The Commissioner next contends that the Second Circuit correctly applied the well-pleaded complaint rule, which precludes federal jurisdiction "if a federal question is merely asserted or anticipated as a defense to a state law claim." (Opp. at 9, *quoting Louisville & Nashville RR. Co. v. Mottley*, 211 U.S. 149, 152 (1908)). That proposition is correct--but note the importance of the word "merely". The Commissioner fails to understand that federal law may be either a defense or the basis of an affirmative claim for injunctive relief--either a shield or a sword. If this case were one in which the Commissioner had sued Fleet in state court, Fleet could not have removed it on the ground that it had a federal preemption defense, under the National Bank Act, to the state court enforcement action.

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[8]Much the same response can be given to a point stated without further explanation in this one sentence in the Opposition: "Further, the Eleventh Amendment prevents a federal court from granting injunctive relief against a state official on the basis of state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 121 (1984)." (Opp. at 7-8.) As this Court noted in *Wisconsin Dep't of Corrections v. Schacht*, ___ U.S. ___, 118 S. Ct. 2047 (1998), a federal court retains subject matter jurisdiction over a civil action even if one of multiple claims might be barred by the Eleventh Amendment. *Id.* at 2053. Thus, since the *Pennhurst* decision could at most raise a question about federal court adjudication of the claim that the Commissioner's threatened action was unauthorized by Connecticut law, it is no surprise that the Second Circuit, in dismissing the entire action, expressly disavowed reliance on *Pennhurst*. (*See* App. A20 n. 6.)

Equally important, the Eleventh Amendment cannot, at this juncture, justify dismissal of the state law claim. The Commissioner did not raise the Eleventh Amendment in his Answer to the Complaint, his Motion to Dismiss, or any other pleading or motion. Nor did he invoke that immunity before the panel of the Court of Appeals or in his opposition to Fleet's petition for rehearing and suggestion for rehearing en banc. As the Second Circuit observed, it is too late for him to do so now. (App. A20 n. 6.) *See Schacht*, 118 S. Ct. at 2054-57 (Kennedy, J., concurring).

But the National Bank Act (like other federal statutes and federal constitutional provisions) can equally well be the basis for an affirmative claim to enjoin enforcement of a preempted state law. *See Barnett Bank of Marion County, N.A. v. Nelson, supra.* And in such a case, as *Shaw v. Delta Airlines*, 463 U.S. 85 (1983), clearly stated, it is

> beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute . . . presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

Shaw, 463 U.S. at 96, n.14.

3. Struggling to distinguish *Shaw*, the Commissioner contends that a) *Shaw* is a "complete preemption" case; b) complete preemption has been recognized only in limited areas, including suits under ERISA, the subject matter involved in *Shaw*; and c) thus *Shaw* cannot support jurisdiction over Fleet's preemption claim under the National Bank Act, which, unlike ERISA, does not completely preempt state law.

The argument fails in its initial premise--that *Shaw* is a complete preemption case. Indeed, as the court below noted, the Shaw opinion "made no reference to the 'complete preemption' doctrine." (App. A10-A11.) That silence is all the more telling because in a companion decision in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983), handed down the same day as *Shaw*, this Court did discuss the complete preemption doctrine at length. *See id.* at 22-27.

Although in the sixteen years since it was decided, *Shaw* has been cited literally hundreds of times by federal courts and discussed extensively in secondary literature, the Commissioner fails to point to a single judge or commentator who reads *Shaw* as having rested on the complete preemption doctrine.[9] Rather, *Shaw* has consistently

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[9]A cursory examination of the complete preemption doctrine shows its lack of applicability to the facts of *Shaw* or of this case. The doctrine applies when a *state court* complaint purports to allege only a *state law* claim, but "the pre-emptive force of [federal law] is so powerful as to displace entirely any state cause of action" and to

been understood as "indicating that ordinarily a person claiming immunity from state regulation may bring a federal court action under § 1331 seeking injunctive relief. " Richard H. Fallon, Jr. et al., *Hart & Wechsler's The Federal Courts and the Federal System* 947 (4th ed. 1996). This Court has consistently followed that understanding of *Shaw*, deciding under the federal question jurisdiction numerous actions like Fleet's that seek injunctive relief against state regulation alleged to be preempted by federal statutes. *See, e.g., Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996) (National Bank Act); *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992) (OSHA); *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495 (1988) (federal energy regulations); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (Natural Gas Act).

4. A final point about the Commissioner's discussion of the decision below again highlights what he does *not* say: he does not defend the actual holding of the Second Circuit. For the court below, unlike the Commissioner's Opposition, acknowledged, albeit grudgingly, that under *Shaw* it would have subject matter jurisdiction had Fleet alleged *only* its federal statutory preemption claim. (App. A18.) The Second Circuit's precise holding was that such federal question jurisdiction evaporated because Fleet joined to its federal preemption claim a related state law claim that the Commissioner's action was unauthorized. (App. A.23.) The Commissioner does not explain how this novel theory of jurisdictional evaporation can be squared with the plain admonition in *City of Chicago v. International College of Surgeons*, *supra*, that

[n]othing in the jurisdictional statutes suggests that

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make "[a]ny such suit . . . purely a creature of federal law," *Franchise Tax Board*, 463 U.S. 1, 23 (1983); *see also Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65 (1987)); *Caterpillar Inc. v. Williams*, 482 U.S. 386, 393(1987); *Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n of Machinists*, 376 U.S. 557 (1968). In these circumstances, removal is proper "even though no federal question appears on the face of the plaintiff's complaint." *Rivet v. Regions Bank of Louisiana*, ___ U.S. ___,118 S.Ct. 921, 925 (1998). By contrast, in both *Shaw* and in this case, the Complaint was filed not in state but in *federal court*; the Complaint expressly asserted a *federal law* claim; and the plaintiff was seeking to invoke, not to evade, federal question jurisdiction.

> the presence of related state law claims somehow alters the fact that [the] complaints, by virtue of their federal claims, were 'civil actions' within the federal courts' 'original jurisdiction.'

118 S. Ct. at 530 (citation omitted).[10] Nor does he explain how the Second Circuit's view that subject matter jurisdiction over Fleet's case was "ill-advised" can be squared with Congress's decision to give federal courts, in federal question cases, supplemental jurisdiction to the full extent authorized by Article III, see 28 U.S.C. § 1367(a), and with a federal court's duty to exercise the jurisdiction that Congress has conferred.

CONCLUSION

The Second Circuit has decided an important issue of federal jurisdiction in a manner that is undisputedly in conflict with the decisions of nine other circuit courts of appeals. The Second Circuit's decision is also inconsistent with the opinions of this Court and with the decisions made by Congress in §§ 1331 and 1367 as to how federal courts should treat state law claims pendent to federal question claims. The Commissioner has made no effort to dispute the divergence of the Second Circuit's course. The effort the Commissioner does make to defend the holding below is simply wrong.

This Court should grant its writ of certiorari to review the decision of the Second Circuit in order to restore uniformity among the circuits as to the reach of district court jurisdiction.

Respectfully submitted,

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[10] *See* note 2, *supra*.